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ABSTRACT

In rulings between 1954 and 1971, the Supreme Court always emphasized that racially segregated schools were inherently unconstitutional, although it upheld a system of student assignments that was neutral toward race. But with the Swann v. Charlotte-Mecklenberg Board of Education decision of 1971, the court embarked on a new remedial course. A decade of widespread forced busing followed, and this only produced racial isolation on a broader scale. Today, the Department of Justice is committed to desegregation premised on consensus, not conflict. Voluntary student transfer techniques and expanded educational opportunities have been designed to attract students to public school, not drive them away. Magnet programs, which appear to have been particularly effective have found wide support in Federal courts and in Congress. Criticized for being too expensive, magnet programs will prove to be more cost-effective than the failed policies of the past. Equally false is the contention that magnets drain the best students from a school system and thus deprive those left in regular schools of equal educational opportunity. In fact, magnet programs have been found to enhance the overall educational environment. Finally, the question of when judicial coercion should terminate remains to be officially answered. But the time has come for the Federal courts to release their hold on school districts: there is a growing unease among educators that, in the name of desegregation, we have surrendered to the courts the day-to-day responsibility of operating schools, all too often with disappointing results. (KH)

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REMARKS

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BEFORE

THE

METROPOLITAN CENTER FOR EDUCATIONAL
RESEARCH, DEVELOPMENT & TRAINING
NEW YORK UNIVERSITY
BROWN PLUS THIRTY CONFERENCE

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The Role of the Federal Government in School Desegregation

I am most happy to have this opportunity to discuss the role of the Federal Government -- specifically the Department of Justice -- in public school desegregation. The subject is of lasting significance, but particularly so today as we meet in commemoration of the 30th Anniversary of Brown. All would agree, I am sure, that the minds of our youth are a most precious resource; plainly, our future depends on the active nuturing of those minds. We could not long remain a great nation if we did not offer equal educational opportunity to all our citizens. Our doing so is both a proud legacy and a grave responsibility. On this 30th anniversary of Brown, we cannot afford to rest on past accomplishments. We must continue the search for better and more effective means of fulfilling the promise of Brown: to examine the past, assess the present and, using those building blocks, plan for the future.

Before turning to the Justice Department's current school desegregation efforts, let me provide a brief backdrop for that important discussion, so that our enforcement activity in this area can be better understood -- from both a legal and a public policy point of view.

An appropriate starting point is the oft-quoted truism given to us by Oliver Wendell Holmes: "The life of the law has not been logic," he said, "it has been experience." It was with

this wisdom that the United States Supreme Court, in Brown v. Board of Education, 347 U.S. 483 (1954), looked back over 84 years of experience under the shameful "separate but equal" regime established by Plessy v. Ferguson, 163 U.S. 537 (1896), and in 1954 declared that racially segregated education facilities are inherently unequal and cannot be squared with the equal protection guaranty in the Fourteenth Amendment to the U.S. Constitution.

The following year, in Brown II, the Supreme Court ordered that the Nation's dual school systems be dismantled "with all deliberate speed" (Brown v. Board of Education, 349 U.S. 294, 300-301 (1955)), pointedly observing that the goal of a desegregation remedy is the admission of students to public schools on a "racially nondiscriminatory basis." Id. at 301.

During the period immediately following Brown II, resistance t. the Court's decree was widespread; far more emphasis was placed on the term "deliberate" than on the direction to move with alacrity, and very few jurisdictions made any measurable progress towards desegregation. In 1968, thirteen years after Brown II, the Supreme Court's patience gave out. In Green v. County School Board, 391 U.S. 430 (1968), the Court demanded that school officials guilty of intentional discrimination in the assignment of students to racially identifiable schools come forth with desegregation plans that "promise[] realistically to work, and promise[] realistically to work now." Id. at 439 (emphasis in original).

In Green, however, the Supreme Court did not alter the fundamental premise established in its landmark decisions of a little over a decade earlier. Race-consciousness as a tool for assigning school children had been flatly condemned in the Brown opinions. It most certainly was not revived in Green. Rather, once again the court reaffirmed (and in no uncertain terms) that all children in a dual school system had a personal right -- a civil right, if you will -- to be treated in a non-discriminatory manner. No mention was made in Green of vindicating that right by resort to some "racial balance" in the classroom; proportional assignments of students along racial lines was nowhere recognized as a permissible desegregation tool to be employed by the courts. Instead, the equal protection ideal of nondiscrimination was to be realized in Green, as in the two Brown decisions, through a system of student assignments neutral as to race.

That is essentially how matters stood until 1971, when the Supreme Court embarked on a new remedial course in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The district judge in Swann had devised a novel and wide-ranging desegregation decree that ordered into effect race-conscious student assignment schemes, employing for the first time the techniques of mandatory busing, alteration of attendance zones, and "racial-balance" assignments of school children. At issue in the Supreme Court was whether judicial reliance on such

remedial devices exceeded the courts' equitable authority to redress the constitutional wrong. In upholding the district court's desegregation plan, the court in Swann for the first time acknowledged that strict race neutrality in a remedial context may not be required where racial imbalance in the school system is directly attributable to past de jure (or state-enforced) segregative activities. Thus, those children who had been assigned to schools because of race (all of whom are victims of discrimination), can appropriately be reassigned under Swann -- and bused elsewhere in the system on a race-conscious basis.

The Court's opinion in Swann was far short of a ringing endorsement of the busing remedy. Rather, it marked a modest (indeed tentative) first judicial step down a remedial path that -- one can only surmise -- became far more travelled than the fondest expectations of even the most avid proponents of the busing remedy. Thus, race-conscious assignments and mandatory student transfers were seen in the early 1970's as the remedies of last resort, not first impression, to be used, if at all, only if "feasible," "workable," "effective," and "realistic." 402 U.S. at 31. Yet, by the end of the decade, use by the lower federal courts of forced busing as the predominant desegregation tool had become almost commonplace, with little attention being paid to the practical consequences of such judicial reordering of our public education system.

Without belaboring the point, let me simply state that the social objective of racial balance in the classroom ultimately overtook the civil rights principle of racial neutrality in student assignments -- which is, of course, the principle that served as the centerpiece for the Supreme Court's decisions in Brown I and Brown II.

Rather than achieving racial balance, however, the preoccupation with mandatory busing has generally produced racial isolation on a broader scale. In case after case, economically able parents have refused to permit their children to travel unnecessary distances to attend public schools, choosing instead to enroll them in private schools or to move beyond the reach of the desegregation decree. Justice Powell has commented on this phenomenon in the following terms:

> This pursuit of racial balance at any cost . . . is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems. */

After more than a decade of court-ordered busing, the evidence is overwhelming that the effort to desegregate through wholesale reliance on race-conscious student assignment plans has failed. The damage to public education wrought by mandatory busing is

*/ Estes v. Metropolitan Branches of the Dallas N.A.A.C.P., 444 U.S. 437, 450 (1980) (Powell, Jr., joined by Stewart and Rehnquist, J. J., dissenting from dismissal of certiorari as improvidently granted).

evident in city after city: Boston, Cleveland, Detroit, Wilmington, Memphis, Denver, and Los Angeles are but a few of the larger and thus more celebrated examples. Nor is it difficult to understand why. The flight from urban public schools contributes to the erosion of the municipal tax base which in turn has a direct bearing on the growing inability of many school systems to provide a quality public education to their students -- whether black or white. Similarly, the loss of parental support and involvement -- which often comes with the abandonment of a neighborhood school policy -- has robbed many public school systems of a critical component of successful educational programs.

Tragically, those who suffer the most are the very ones that the proponents of mandatory busing intended to be the greatest beneficiaries -- that is, the blacks and other minorities left within the inner city public school systems. It is they who, from most accounts, have little to show educationally as a result of the past decade of court-imposed student assignment plans. Although findings are not absolutely conclusive in this regard, a major study released by the National Institute of Education in May of this year strongly indicates that racial-balance desegregation remedies have been ineffective in providing a better education for minority students. As David J. Armor, a noted desegregation expert, states in the report:

> The very best studies available demonstrate no significant and consistent effects of desegregation on Black achievement. There is virtually no effect whatsoever for math achievement, and for reading achievement the very best that can be said is that only a handful of grade levels from the 19 best available studies show substantial positive effects, while the large majority of grade levels show small and inconsistent effects that average out to about 0.

Small wonder, then, that the Department of Justice has moved away from its earlier misguided preoccupation with forced busing that has too often ill-served the desegregation command of Brown. The admonition of Oliver Wendell Holmes to learn from "exprience" has been heard. We are today committed to the pursuit of a different remedial approach to achieve the desegregation ideal announced in Brown -- one premised on consensus, not conflict. Our focus is no longer on the mandatory transportation feature, but rather on voluntary student transfer techniques and expanded educational opportunities designed to attract students to the public school, not drive them away. Our remedial program has as its centerpiece special magnet schools and other curriculum enhancement programs that provide educational incentives to all children in the system. And the choice of schools is left to each student -- with a full range of transfer options -- not to some preconceived assignment plan superimposed on the public school system by well-intentioned judges who misperceive racial percentages and classroom proportionality as a measurement of equal opportunity.

It is a bit too early to declare the magnet program a complete desegregation success. There are, however, a number of encouraging indicators and very few discouraging ones. The Justice Department has utilized its new remedial approach in a variety of situations: from a large metropolitan area like Chicago to a small rural school district like Port Arthur, Texas. One of the best (or at least one of the most comprehensive) magnet programs was put in place late last year in Bakersfield, California. As expected, we are finding that magnet schools do indeed attract students, and -- when strategically placed and carefully designed -- can provide the needed incentive for white and black pupils to attend the same schools by choice, not by coercion.

In fact, a recent Department of Education survey of some 45 magnet programs in 15 school districts provided encouraging confirmation that "urban school districts can desegregate quite comprehensively by relying heavily on magnets. . . ." As that report observes:

> . . . magnets appear to be urgently desirable. A magnet can be designed to be receptive, hospitable, safe, educative, and desegregatively lawful.

We certainly are finding that to be the case. Indeed, the NAACP has just recently, in the Cincinnati school desegregation case, embraced the magnet school concept as an acceptable desegregation option.

In short, the Federal courts are, with increasing regularity, turning to the magnet alternative (in lieu of forced busing) to desegregate dual school systems; the most avid proponents of mandatory student assignments are beginning to rely instead on voluntary transfer measures that utilize educational enhancements as the principal incentive factor; and both Houses of Congress have voiced a strong preference for accomplishing the desegregation objective through means other than forced busing. Against this backdrop, it is just a matter of time -- and not much time, at that -- before communities will be permitted to return the neighborhood public schools to their neighborhoods, but with sufficient flexibility in attendance requirements to ensure that all children in the system, without regard to race, color, or national origin, will be accorded the full range of educational opportunities in a desegregated school environment.

To be sure, our alternative to the forced busing approach is not without its skeptics and critics. There are those who assert that magnet schools are too expensive. The short answer is that, when compared with the costs of desegregation under the mandatory transportation remedy, it is far from clear that a well-conceived magnet plan requires significantly more money. Plainly, over time, the desegregation efforts based on magnet schools and voluntary transfer measures will prove more cost-effective than the failed policies of the past. Moreover, there are, I submit,

fewer better expenditures of the taxpayers dollars than on the public education of our children, and, if truly meaningful desegregation comes at a bit higher price than originally conceived (when the only remedial tool used was the yellow school bus), it is an added cost well worth the shouldering.

I also hear the regular refrain that magnet schools drain the best and brightest students from the public school system, leaving it worse (not better) off, and depriving those left in the regular (non-magnet) schools of an equal educational opportunity. This criticism can only come from those not fully familiar with the remedial program involved. Use of magnet schools has never been advanced by the Department of Justice in isolation. Rather, the desegregation plan includes not only magnets, but also mini-magnets (that assist in the transition from a regular to a special curriculum), enhanced educational programs (including as appropriate special tutoring in basic academic skills) and other particularized teaching devices -- all designed to insure that the command of Brown to afford to all school children an equal educational opportunity is realized throughut the system. We have yet to witness a situation, postulated by those who are frequently so quick to criticize, in which implementation of a comprehensive magnet program benefits but a few and is otherwise educationally draining on the system as a whole. Rather, just the opposite has proven to be the case: the program has served to enhance the educational environment overall while achieving desegregation

desegregation of the racially identifiable schools at an encouraging rate.

That is, of course, precisely the promise of Brown -- a promise that now appears ever closer to being fulfilled. This is not to suggest that we stop probing for even better ways to achieve stable and lasting desegregation of dual school systems. The magnet program is not perfect, and we remain open to suggestions for improvement.

One other aspect of the court-ordered busing controversy deserves mention: the question of when such judicial coercion should terminate. One of the most troublesome features of school desegregation decrees is that they rarely seem to come to an end. For reasons that have never been altogether clear, there appears to be a general reluctance among district court judges who have fashioned relief in school cases to acknowledge many years -- in some cases decades -- later that the terms of the decree have long since been satisfied and that it is time to return the administration of the public schools to the elected officials who sit on the school board. As you know, the term of art that is used to signify the point at which the segregated system has been dismantled is "unitariness" -- the segregated (or dual) school district has become desegregated (or unitary) in accordance with the court-ordered plan.

I have stated on a number of occasions, and will repeat here, that one of the most important issues for the 1980's in the field of school desegregation is, in my opinion, when, and under what circumstances, a school district under court order is entitled to a judicial declaration of unitariness, thereby releasing it from the court's jurisdiction. That issue is squarely before the district court in Colorado, where the Denver school board in the much-celebrated Keyes desegregation litigation is asking the court, some eight years after implementation of the court-ordered plan, for a declaration of unitariness.

We have joined in the Denver school board's request, urging the court to measure unitariness, not in terms of rigid racial percentages or the degree of racial balance throughout the school system, but rather in terms of the school board's full and faithful compliance with the desegregation requirements imposed by the decree. If the school officials have complied with all the terms of a comprehensive desegregation plan, we argue that a declaration of unitariness should follow -- even if some schools in the system, due to factors beyond the school board's control, such as demographic shifts, may never have attained (or, even if attained, not continued to maintain) the precise racial percentages for student enrollment contemplated in the court-ordered plan.

It is time for the Federal courts to release their hold on school districts that have long been in compliance with comprehensive desegregation decrees. Our public schools far

better serve the educational needs of our youth if run by those who are answerable to the electorate for the decisions made, than if left under the supervision of the Judiciary beyond the time necessary to cure fully the constitutional violation. There is, I sense, a growing unease among educators that, in the name of desegregation, we have in many instances surrendered to the courts the day-to-day responsibility of operating our public schools -- all too often with disappointing results. I therefore anticipate that the unitariness issue will begin to be joined with greater intensity in the months ahead.

I have, I am sure, gone on too long. Let me conclude by returning to my opening remarks. School desegregation is as critical an issue on the civil rights agenda as any we face today. Discrimination on account of race, whether it occurs in the admissions office, the schoolyard, or the classroom is intolerable and must be eradicated in its entirety wherever it occurs. At the same time, however, we cannot lose sight of the fact that the desegregation effort affects in a most crucial way the lives, aspirations, and opportunities of our children. It serves no useful purpose to claim a racial-balance victory if in the process we have effectively destroyed -- or even seriously hindered -- the educational potential of an entire generation of public school students. Regrettably, the preoccupation with forced busing has left just such a legacy in too many jurisdictions.

Now, thirty years after Brown, the country appears to have altered its course, and returned to the ideals reflected in the Brown decisions -- where equal education, not transportation, is the predominant theme, and where the purpose is to afford all public school students, without regard to race, color or ethnic origin, an enhanced educational experience in a school environment free from racial discrimination. It is heartening to know that we are on course with a remedial approach that promises a full and meaningful response to the callous injustice of racial discrimination -- not by imposing burdens on innocent individuals because of color, but by reaching out to all individuals and extending the full measure of opportunity for an enhanced education in a desegregated environment.

Thank you.